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Supreme Court of the United States

CITY OF MAYWOOD, BRUCE LEFLAR, ANGEL VILLEGAS, SEAN RICHARDSON, JERRY SALGADO, ROBERT LEACH and DARIN MOELLER,
Petitioners,

v.

JOSEPH DENSMORE, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Probationary police officer Joseph Densmore reported a fellow officer's crime to a superior via e-mail. He allegedly suffered retaliation. Under the department's Policy Manual and California law, police officers have a duty to report crimes. **Did Densmore speak within the scope of his duties in reporting the crime -- barring his First Amendment retaliation claim?**

2. Defendants moved for summary judgment on the ground Densmore spoke within the scope of his duties and thus did not engage in First-Amendment-protected speech. Densmore submitted a declaration opining that his job duties did not require him to make the report; to the contrary, he opined, a "code of silence" within the police department required him *not* to report his fellow officer's misconduct. Despite Densmore's evidence, the district court granted summary judgment. **Did the district court correctly decide the scope of duties as a question of law, or did Densmore's evidence establish a genuine issue of fact?**

3. And more generally: **After *Garcetti*,[1] is the protected speech determination *still* to be decided by the court as a "question or law," or do disputed facts raise a "question of fact" to be decided by a jury?**

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[1] *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006)

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Joseph Densmore, Jr., plaintiff, appellant below, and respondent here;

- City of Maywood, Bruce Leflar, Angel Villegas, Sean Richardson, Jerry Salgado, Robert Leach and Darin Moeller, all defendants, respondents below, and petitioners here.

There are no corporations involved in this proceeding.

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Petitioners seek review under this Court's rules 10(a) and 10(c). This Petition explains in Section 5 that there is a deep division among the federal Circuit Courts of Appeal about whether, after *Garcetti, supra*, 547 U.S. 410, the protected speech determination should be a question of fact or of law. Moreover, as discussed in Section 3, *Garcetti* seems to have left that question open for future consideration. The plethora of recent federal appellate decisions addressing that question make further consideration appropriate at this time.

OPINIONS BELOW

This petition seeks review of the Ninth Circuit Court of Appeals unpublished opinion filed November 24, 2008. (Appendix A). A Minute Order issued by the Central District Court of California granted summary judgment on August 21, 2007. (Appendix B).

BASIS FOR JURISDICTION

Title 28 U.S.C. § 1254(1) gives this court jurisdiction to review court of appeals decisions by writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

- **U.S. Const. amend. I:**

  > Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- **U.S. Const. amend. XIV, § 1:**

  All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- **42 U.S.C. § 1983:**

  Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges,

> or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The District Court had subject matter jurisdiction of the case under Title 28 U.S.C. § 1343, recovery of damages for deprivation of civil rights. The underlying action seeks remedies pursuant to Title 42 U.S.C. § 1983.

FACTS

We summarize the facts as they appear in the district court's Minute Order granting summary judgment for the defendants. (Appendix "B.") Our

summary adopts Densmore's version of the facts, except where the record so plainly contradicts those facts that no reasonable jury could believe Densmore. *Scott v. Harris*, 550 U.S.372, 127 S.Ct. 1769, 1775-1776, 167 L.Ed.2d 686 (2007).

The Bernal Incident

Densmore began work with Maywood's Police Department as a probationary police officer on April 1, 2004. Beginning on April 28, 2004, officer Michael Singleton acted as his field training officer. Appendix "B," page B-5.

On May 13, 2004, Densmore observed Singleton beat up a handcuffed prisoner named Bernal in the sally port area of the police station. Singleton rendered Bernal unconscious by strangling him and beating him with his left fist. B-5 and 6.

Densmore radioed for paramedics to come to the Police Station. Upon arrival, they thought that Bernal might have suffered a stroke. Densmore followed the ambulance transporting Bernal to a hospital emergency room. *Id.*

Densmore Reports Singleton's Misconduct to the Police Department

After the Bernal incident, Singleton and Densmore rode back to the Police Station together. At that time, Singleton told Densmore to write a report that would justify Singleton's use of force. Specifically, Singleton told Densmore to say that

Bernal committed a felony assault with force likely to result in great bodily injury in violation of Section 245 of the California Penal Code by (1) head butting Singleton, (2) kicking Singleton, and (3) attempting to bite Singleton. *Id.*

Densmore refused to prepare a false report. Singleton then rewrote Densmore's report of the incident by using Densmore's computer password. *Id.*

The next day, May 14, 2004, Densmore sent an e-mail to Sargent Robert Leach alerting him to Officer Singleton's misconduct. Leach was an administrative sergeant who worked directly for Chief of Police Leflar. *Id.*

On May 20, 2004, Densmore met with Leflar and with Captain Moeller regarding the Bernal incident. Leflar and Moeller indicated to Densmore that they wished to discuss the e-mail Densmore sent to Sergeant Leach on May 14, 2007. Densmore claims that he truthfully answered their questions. He did not provide any recommendations; nor did Leflar or Moeller ask for recommendations. B-5 through 7.

Densmore later gave a statement to David Weldon, an outside investigator hired by Maywood to conduct an internal investigation. B-7.

Densmore never reported Singleton's misconduct to the press or to anyone outside of the police department. B-18.

Alleged Retaliation against Densmore, and his Termination from Employment

Densmore claims that beginning on May 15, 2004 – the day after he reported Singleton's misconduct – Maywood police officers began retaliating against him for reporting Singleton's misconduct. For instance, they falsely accused him of failing to follow orders and correct procedures at crime scenes. One officer fabricated eighteen instances of Densmore's alleged performance of his duties in an unsafe manner. B-6.

Maywood claims that Densmore failed to satisfactorily perform his duties as a Probationary Peace Officer and, on that basis, it terminated his employment. B-6 and 7.

Densmore's Duty to Report Singleton's Misconduct

Densmore states that as a probationary officer, he had no official job requirement to ferret out, investigate, and prosecute criminal or other wrong doing within the rank and file of the Maywood Police Department. B-7.

Densmore claims that when he sent the e-mail reporting Singleton's misconduct to Sergeant Leach, he was acting as any citizen should if the witnesses a police officer commit a crime. Sargent Leach never spoke to Densmore about the e-mail, and Densmore was never asked to prepare a report detailing what he had seen regarding the Bernal incident.

Densmore claims that all his statements regarding the incident, including those he made to investigator Weldon, were made only as a concerned citizen. B-7 and 8.

Maywood disputes Densmore's characterization of his official duties. Maywood claims that (1) all Maywood police officers must take prompt and proper police action with respect to any violations of law that come to their attention; (2) all Maywood peace officers must immediately notify a supervisor when they become aware of possible misconduct by another peace officer; (3) all peace officers who observe serious misconduct must take appropriate action to cause the misconduct to immediately cease; and (4) all Maywood police officers are responsible for preventing and reporting misconduct. B-8.

Furthermore, Maywood Police Department's Manual of Policy and Procedure explicitly states, in section 4.12, entitled "Responsibility of All Officers," that "[t]he special delegation of the enforcement of certain laws to particular divisions or other units does not relieve officers of the responsibility of taking prompt and proper police action relative to violations of any law observed by them or coming to their attention." Densmore admitted in his declaration that he had read the Maywood Police Manual. *Id.*

Densmore's Claim that a "Code of Silence" Superseded His Official Job Duties

In response, Densmore claims that he had no duty to report misconduct because there existed an alleged

"code of silence" in the Maywood Police Department. Therefore, his actual duty, insofar as the police department was concerned, was to keep silent about his fellow officer's misconduct and help to cover it up. B-14 and 17.

DENSMORE'S SECTION 1983 ACTION

Densmore sued the City of Maywood and individual police officer employees of Maywood, including defendants Bruce Leflar, Angel Villegas, Sean Richardson, Jerry Salgado, Robert Leach and Darren Moeller. B-2.

After one of his claims was dismissed, Densmore asserted the following claims against defendants, all under 42 U.S.C. § 1983:

- A claim against the officer defendants for allegedly violating Densmore's First Amendment rights by retaliating against him for his speech;

- A claim against the officer defendants for conspiracy to violate Densmore's First Amendment rights; and

- A claim against Maywood for its municipal policy.

See B-2 and 3.

THE DISTRICT COURT GRANTS SUMMARY JUDGMENT AGAINST DENSMORE

The officer defendants moved for summary judgment in the district court. Maywood filed a separate summary judgment motion.

The district court granted the defendants' summary judgment based on four points laid out at B-14 though 16:

> "First, it is not clear that any citizen could have made the relevant speech that Densmore made. Also, even if a citizen could have made the relevant speech that Densmore made, this fact is not persuasive because the *Garcetti* Court made clear that the determinative factor in deciding whether the speech of a public employee should receive First Amendment protection is whether the public employee speaks in the course of performing his job duties.
>
> "Second, Maywood places an explicit duty on its police officers to take proper police action when confronted with illegal conduct, just as Densmore did. Maywood Police Department's Manual of Policy and Procedure explicitly states in the section titled "4.12 Responsibility of All Officers" that "[t]he special

delegation of the enforcement of certain laws to particular divisions or other units does not relieve officers of the responsibility of taking prompt and proper police action relative to violations of any law observed by them or coming to their attention." (Decl. of Jennifer Swiller, Exh. I, ch.4, p. 3/12.) Densmore admits in his declaration that he read the Maywood Police Manual. (Densmore Decl., ¶ 113.) Therefore, Densmore should have been aware of his duty to report the criminal activity of his fellow officers. Densmore cannot escape the fact that Maywood clearly and unambiguously placed a duty on him as one of its police officers to "take prompt and proper police action" in light of his discovery of his fellow officer's clearly criminal conduct. In this case, "prompt and proper police action" included reporting his fellow officer's misconduct to Densmore's superior officers.

"Third, even without Maywood's explicit statement of an officer's duty to take proper police action upon discovering a clear violation of a law by a fellow officer, this duty was undoubtedly and obviously incumbent on Densmore as a police officer

as a matter of public policy. Also, the California courts have stated for many years regarding law enforcement officers that "[s]uch officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws. When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts . . . when called upon to do so . . . It is for the performance of these duties that police officers are commissioned and paid by the community, and it is a violation of said duties for any police officer to refuse to disclose pertinent facts within his knowledge . . ." *Titus v. Civil Service Com.*, 130 Cal.App.3d 357, 364, 181Cal.Rptr. 699 (1982); *Christal v. Police Commission*, 33 Cal.App.2d 564,

567-68, 92 P.2d 416 (1939). *See also Alhambra Police Officers Ass'n v. City of Alhambra Police Dept.*, 113 Cal.App.4th 1413, 1422-23, 7 Cal. Rptr.3d 432 (2003). The California courts' repeated and long-established statements about police officers' duties comport with common sense. Thus, even without Maywood's explicit statement of Densmore's duties, Densmore should have been aware that he had a duty as a police officer to report his fellow officer's clearly criminal misconduct.

"Densmore claims that he had no such duty as a police officer because there existed a "code of silence" in the Maywood Police Department. Therefore, Densmore argues that his actual duty as a Maywood police officer was to keep silent about his fellow officer's misconduct and to help to cover it up. The Court is aware that a Northern District of California decision in *Batt v. City of Oakland*, 2006 WL 1980401 (N.D. Cal. 2006) accepted precisely the same "code of silence" argument in a factually similar case on a motion for summary judgment. In *Batt*, Keith Batt alleged that while he was a trainee working for the Oakland Police Department, he observed his

fellow officers commit numerous brutal and illegal acts. *Id.* at *1. The *Batt* court noted that Batt provided several pieces of evidence in support of his contention that "he feared retaliation in the event of speaking out, and that the [Oakland Police Department] had a general culture of punishing officers who reported misconduct." *Id.* at *2. In analyzing whether Batt acted as a citizen or was merely performing his job duties when he reported his fellow officers' misconduct, the Batt court stated that, based on *Garcetti*, "an employer's articulation of a 'duty,' without more, does not eliminate any obligation to comply with the First Amendment. Rather a court must determine whether the employee is 'actually expected to perform' the potentially protected act." *Id.* at 4. Based on this reasoning, the *Batt* court found that Batt had presented evidence that the "code of silence" within the Oakland Police Department created an issue of fact regarding Batt's duties as a police officer.

"In this case, the Court finds that the reasoning from *Batt* is unconvincing and rejects Densmore's argument about the "code of silence."

Here, Densmore has submitted evidence that supports his claim that a "code of silence" existed within the Maywood police department. However, even assuming the existence of the "code of silence," the pressure exerted by his fellow officers cannot supercede Densmore's fundamental duties as a police officer. While Densmore's reporting of his fellow officer's misconduct might have required courage to resist intense pressure from his fellow officers, Densmore was fulfilling his duties as a police officer by doing so. What Densmore was "actually expected to do" was to uphold the law, despite his fellow officers' illegal and contrary expectations. What Densmore was "actually expected to do" was to fulfill his fundamental duty as a police officer and report his fellow officer's criminal misconduct, a duty that, while difficult in some circumstances to uphold, California courts have long recognized.

"Finally, the fourth primary reason the Court rejects Densmore's contention that he was acting as a citizen when making his speech is that Densmore reported Singleton's misconduct only to Sergeant Leach,

> the administrative sergeant who worked directly for Police Chief Leflar. Densmore never reported Singleton's misconduct to the press or to anyone outside of the police department. Densmore's actions suggest that he intended to proceed with his report against Singleton according to police department policies, rather than as a citizen intending to publicize Officer Singleton's misconduct."

On that basis, the district court ruled that:

- Densmore's § 1983 claim against the officers for violation of his First Amendment Rights fails as a matter of law, because Densmore cannot show that his relevant speech was entitled to First Amendment protection. The court held that under *Garcetti supra*, 547 U.S. 410, when Densmore reported his fellow officer's suspected crime, Densmore spoke as a police officer, not as a private citizen. B-18.

- Densmore' conspiracy claims against the officers fails as a matter of law, because Densmore cannot show a violation of his First Amendment rights. B-20.

- Densmore's claim against Maywood fails for the same reason. B-21.

The district court entered judgment for defendants and Densmore appealed.

THE NINTH CIRCUIT REVERSES THE DISTRICT COURT JUDGMENT

On review, the three judge panel of the Ninth Circuit noted in its unpublished memorandum decision (Appendix "A") that:

> "Densmore contends that although the police manual contained a very general section directing officers to take "prompt and proper police action relative to violations of any law observed by them" regardless of their area of assignment [footnote omitted], he was a probationary officer with no official job requirement to investigate or report wrongdoing within the department, i.e, he was not employed as an "internal affairs investigator." He claims he reported his fellow officer's misconduct just as any citizen could do if he or she witnessed a police officer commit a crime. A-3.

Moreover,

> "Densmore alleges there is a "code of silence" operating within the department, so that in reality he was *not* expected to report his fellow

> officers, but to cover up their misdeeds. Densmore supported this assertion with his own declaration regarding comments made to him before and after the incident, as well as declarations from independent investigator Larry Weldon and police practices expert Patrick Connolly. *Id.*

On that basis, the panel held:

> "The district court determined that *Garcetti* requires the Court to first determine *as a matter of law* whether Densmore was speaking 'as a citizen' or, instead, pursuant to his job duties," and ultimately concluded that Densmore's speech was made pursuant to his employment. However, as we recently explained in *Posey* [*v. Lake Pend Oreille School Dist. No. 84* (9th Cir. 2008) 546 F.3d 1121, 1126,] "the determination whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law," which "can and should be found by a trier of fact." 2008 WL 4570616 at *6 [546 F.3d at 1029]. As in *Posey*, "the pleadings and evidence in this case present genuine disputes of material fact regarding the scope and content

> of [Densmore's] job responsibilities." *Id.* at *7; *see also Paola v. Spada*, 498 F.Supp.2d 502, 509 (D.Conn. 2007) (question of fact whether state trooper's report of misconduct was born out of professional duty); *Batt v. City of Oakland*, 2006 WL 1980401,*4 (N.D.Cal.2006) (factual issue whether, notwithstanding official police department policy, culture and direction of superiors created duty *not* to report misconduct). [Footnote omitted.] A-3 and 4.

REASONS FOR GRANTING THE WRIT

1. BEFORE *GARCETTI*, COURTS DECIDED PROTECTED SPEECH ISSUES AS A MATTER OF LAW

In order to sustain a First Amendment retaliation claim, a public employee must show that he or she engaged in constitutionally protected speech. *Posey v. Lake Pend Oreille School Dist No. 84*, 546 F.3d 1121 at 1126 (9th Cir. 2008). The courts have enunciated a three element test. Until recently, the first element required a court to determine as a matter of law (1) whether the speech at issue "touch[ed] on a matter of public concern," and if so, (2) whether "the interests of the [employee], as a citizen, in commenting upon matters of public concern [outweighed] the interest of the State, as an employer, in promoting the efficiency of the public

services it performs through its employees." *City of San Diego v. Roe*, 543 U.S. 77, 82-83, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) (some internal quotations omitted).[1]

If a court determined that the speech at issue in any given case failed to raise a matter of public concern sufficient to outweigh the state's interest in efficient operation, then the speech was not protected. As *Posey* acknowledged, "this two-stage inquiry into the protected status of the speech was purely legal and therefore properly decided on summary judgment. See *Connick v. Myers*, 461 U.S. 138, 148 n. 7, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) ('The inquiry into the protected status of speech is one of law, not fact'.)." *Posey v. Lake Pend Oreille School Dist., supra*, 546 F.3d at 1126.

2. *GARCETTI* ADDED THE "PURSUANT TO HIS DUTIES" TEST TO THE PROTECTED SPEECH DETERMINATION

In *Garcetti, supra*, 547 U.S. 410, this court added a third stage to the first element of the First

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[1] The second and third elements, not at issue in this petition, are whether the employer took adverse employment action against the employee, and the employee's speech was a "substantial or motivating" factor in the adverse action. *Freitag v. Ayers*, 468 F.3d 528, 543 (9th Cir.2006) (citing *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir.2003)).

Amendment retaliation test: A determination whether the plaintiff spoke as a public employee or instead as a private citizen. The Court held that when a public employee speaks pursuant to his or her official duties the speech is not protected because any restriction on that speech "simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 422, 126 S.Ct. 1951. See *Posey v. Lake Pend Oreille School Dist., supra*, 546 F.3d at 1126.

In *Garcetti*, deputy district attorney Cebellos, in his role as a "calendar deputy," wrote a "disposition memorandum" critical of an affidavit that the Los Angeles District Attorney's Office had used to obtain a search warrant. He claimed that in the aftermath of the memorandum and discussions about it with his supervisors, he was subjected to a series of retaliatory employment actions. *Id.*, 547 U.S. at 414-415. He subsequently brought a First Amendment retaliation action against the district attorney under 42 U.S.C.§ 1983. But this court found that Cebellos' memorandum was not constitutionally protected under the First Amendment. Although considering a number of factors, the Court emphasized that "[t]he controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. See Brief for Respondent 4 ('Ceballos does not dispute that he prepared the memorandum "pursuant to his duties as a prosecutor'")." *Id.*, 547 U.S. at 421.

3. AN OPEN QUESTION AFTER *GARCETTI*: ARE PROTECTED SPEECH ISSUES STILL EXCLUSIVELY A QUESTION OF LAW?

In *Garcetti*, this Court observed that

> "the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Garcetti, supra*, 547 U.S. at 424.

This observation left an open question about how a court should resolve the First Amendment issue where the litigants dispute whether or not an employee spoke "pursuant to" his or her job duties. As adumbrated in section 5 below, some federal Circuit Courts of Appeals treat this question as one of law for the court to decide. Others, including the Ninth Circuit in *Posey*, reason that a "serious debate" over the scope of job duties means that a court faces a "mixed question of fact and law." If so, a court may apply its legal conclusions only after a jury or other trier of fact first resolves the disputed facts. "Thus, when there are genuine and material disputes as to the scope and content of the plaintiff's job responsibilities, the court must reserve judgment . . .

until after the fact-finding process." *Posey v. Lake Pend Oreille School Dist., supra*, 546 F.3d at 1126.

4. THE NINTH CIRCUIT'S ANSWER IN *POSEY*: THE INQUIRY IS NO LONGER PURELY LEGAL, BUT PRESENTS A "MIXED QUESTION OF FACT AND LAW."

Robert Posey sued Lake Pend Oreille School District on the allegation that the District, in eliminating his job, retaliated against him for prior speech in violation of the First and Fourteenth Amendments. The district court granted summary judgment in favor of the District based on its conclusion, reached solely as a matter of law, that the speech in question was not constitutionally protected because Posey spoke pursuant to his job responsibilities in his capacity as a public employee. *Posey v. Lake Pend Oreille School Dist., supra*, 546 F.3d at 1123.

Posey worked as a "security specialist" at the District's Sandpoint High School. In 2002, he expressed his concerns about student discipline and safety issues to Sandpoint's principal. Not receiving a satisfactory response, Posey composed and delivered a lengthy letter in 2003 to the District's Chief Administrative Officer, with whom Posey had a friendly relationship. Posey also copied the letter to two other school administrators. Although mentioning personal grievances, "the bulk of the letter addressed Posey's concerns about inadequate safety and security policy and enforcement at the school."

Posey v. Lake Pend Oreille School Dist., supra, 546 F.3d at 1124.

The parties did not dispute that Posey wrote the letter (addressing the CAO by his first name "Steve") at home, and on his own time and initiative. However, the parties did dispute whether Posey wrote the letter as part of his official employment responsibilities. About his job responsibilities, the *Posey* court recited the following facts, 546 F.3d at 1124-1125:

> "The evidence indicates that Posey was initially hired in 1995 as a 'parking lot attendant' for Sandpoint High School. His job title changed periodically throughout his subsequent nine years of employment for the District. Some time before 2002, Posey's title was changed to "Security Specialist." In that role, Posey was initially responsible for twenty enumerated tasks relating to preventing and responding to student misconduct.
>
> "In 2002, however, Principal Soper substantially reduced Posey's job responsibilities. Posey was relieved of responsibility for all specified tasks except assisting with security and crime prevention, and supervising the school parking lot, grounds, and hallways. Posey had

been but was no longer responsible for liaising with police, enforcing truancy policies, searching students, and investigating student misconduct.

"The parties specifically dispute whether Posey had any policy-making responsibility or authority to support a conclusion that Posey's letter 'was required as a part of [his] official duties,' *Marable v. Nitchman*, 511 F.3d 924, 932 (9th Cir.2007). In 2002, for instance, Soper instructed Posey to 'update' the school's emergency plan. Posey subsequently submitted a 'document' updating the plan. The School District therefore insists that Posey 'provided reports and information about security matters at the high school' as 'an inherent part of his duties' and characterizes his letter as an 'internal communication' that "ar[ose] as part of [his] job duties."

"Posey counters that no aspect of his job description required him to 'report[ ] wrongdoing by administrators or co-workers' and that 'his role in student discipline did not extend beyond discrete tasks such as ensuring that the parking lot remained orderly at the end of the

> school day.' Indeed the record indicates, by Soper's own admission, that responsibility for updating the emergency plan was reassigned in part '[b]ecause Mr. Posey was not in full charge of those issues.' FN1
>
> "FN1. Adding to the confusion surrounding Posey's job responsibilities, the parties' characterizations appear to have shifted in the time between their depositions and the identification of the relevant legal questions at issue in this case. Principal Soper, for instance, indicated in 2006 that Posey 'was very good at coordinating the parking lot . . . . but as far as the actual security of it, not really, he didn't have a lot to do with that.' And around the same time, Posey insisted that ensuring student safety and security 'was my job description [and] was a function of my job.' In their briefing before this court, each party has made a resolute 180-degree turn in their respective characterizations of Posey's duties."

The *Posey* court contrasted this "factual dispute" with the record before this Court in *Garcetti*:

> "[I]n *Garcetti* there was no dispute that Ceballos's internal

> memorandum had been written in execution of Ceballos's official employment responsibilities. *Id.* at 424, 126 S.Ct. 1951 ('[T]he parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties."). Thus the Court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.*
>
> > "Here there is room for precisely such debate regarding whether Posey wrote and delivered his letter in execution of his official employment duties. (Footnote omitted.) Given the factual disputes presented in the record, we must therefore determine whether the inquiry into the protected status of speech remains one purely of law as stated in *Connick*, or if instead *Garcetti* has transformed it into a mixed question of fact and law."

As already discussed, the *Posey* court came down squarely in favor of a "transformation" of the inquiry into the protected status of speech into a "mixed question of fact and law." The Ninth Circuit court recognized that this construction of *Garcetti* represents a significant departure from the *Connick*

inquiry into the protected status of speech purely as a question of law. In its own words,

> "following *Garcetti*, the inquiry into whether a public employee's speech is protected by the First Amendment is no longer purely legal and presents a mixed question of fact and law. Summary judgment is therefore inappropriate where, as here, . . . there is a genuine and material dispute as to the scope and content of plaintiff's employment duties." *Posey v. Lake Pend Oreille School Dist., supra*, 546 F.3d at 1123.

As developed in the following sections of this brief, the federal Circuit Courts of Appeal are far from unanimous in adopting the Ninth Circuit's "mixed question of fact and law" analysis; moreover, there are sound reasons for rejecting the Ninth Circuit analysis, especially whereas, in the present case, the "debate" over the scope of a plaintiff's job duties resides primarily in the conflict between the parties' subjective characterization of those duties.

5. THE SPLIT AMONG THE CIRCUIT COURTS OF APPEAL

After *Garcetti,* the federal Circuit Courts of Appeal have split on the question of whether a court should as a question of law, resolve disputes over the scope of job an employee's duties. Like the Ninth Circuit, the Third Circuit has held that the determination is a mixed question of fact and law. *Reilly v. City of Atlantic City*, 532 F.3d 216, 227 (3d Cir. 2008); *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007)). On the other hand, the Fifth, Tenth and D.C. Circuits have held that the determination of whether the employee has spoken as an employee or a citizen remains a question of law to be decided by the court. *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008); *Rammer-Halter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202-03 (10th Cir. 2007); *Wilbur v. Robinson*, 480 F.3d 1140, 1149 (D.C.Cir. 2007).

There is no better guide to this split than *Posey* itself, 546 F.3d at 1127-1128:

> "Our sister circuits are split over the resolution of this question. In *Charles v. Grief*, 522 F.3d 508 (5th Cir.2008), for example, the magistrate judge had concluded that the question whether Charles's statements were made in his capacity as a citizen or an employee presented a genuine issue of material fact requiring trial. *Id.* at 513 n. 17. On appeal, however, the

Fifth Circuit disagreed, concluding that 'even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question whether Charles's speech is entitled to protection is a legal conclusion properly decided at summary judgment.' *Id.*

"The Tenth Circuit has also concluded that '[all] three steps' of the inquiry into the protected status of speech, including the 'determination] whether the employee [has spoken] pursuant to [his] official duties,' 'are to be resolved by the district court [and not] the trier of fact.' *Rammer-Halter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202-03 (10th Cir.2007). There, despite a dispute among the parties, the court found at summary judgment that some of the plaintiffs' speech had been made pursuant to their employment duties and some had not. *Id.* at 1204.

"The District of Columbia Circuit has also held, following *Garcetti*, that the question whether a plaintiff 'has spoken as a citizen on a matter of public concern' is a

'question[ ] of law for the court to resolve,' and not a 'question[ ] of fact ordinarily for the jury.' *Wilbur v. Robinson*, 480 F.3d 1140, 1149 (D.C.Cir.2007) (internal quotation omitted) (going on to affirm summary judgment because, on review of the evidence of plaintiff's alleged but apparently disputed employment duties, the speech 'easily' fell within the plaintiff's job responsibilities).

"In conflict with the Fifth, Tenth, and D.C. Circuits, the Third Circuit has 'held that "whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law."' *Reilly v. City of Atlantic City*, 532 F.3d 216, 227 (3d Cir.2008) (quoting *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir.2007)). In *Foraker*, the Third Circuit considered a First Amendment retaliation case that had already gone to trial. The court applied 'clear error' review to the factual finding that the plaintiffs' speech had been 'made pursuant to employment duties.' *Foraker*, 501 F.3d at 250 (Pollak, J., concurring).

> "The Seventh Circuit has implicitly sided with the Third Circuit, concluding in *Davis v. Cook County*, 534 F.3d 650 (7th Cir.2008), that summary judgment was appropriate because 'no rational trier of fact could find' that Davis's speech had been made in her capacity as a private citizen. *Id.* at 653. And, prior to *Garcetti*, the Eighth Circuit had already concluded (with respect to the second element, requiring the balancing of interests between the individual and the state FN3) that 'any underlying factual disputes concerning whether the speech at issue [is] protected should [be] submitted to the jury.' *Casey v. City of Cabool*, 12 F.3d 799, 803 (8th Cir.1993) (citing *Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir.1993)). (Footnote omitted.)"

This is a division of opinion among the federal Circuit Courts of Appeals on an important question that only this Court can resolve. And for the reasons in the next section, it ought to be resolved in favor of the petitioners in the present case: I.e., this Court should retain the traditional "question of law" determination of protected speech issues.

6. WHY THE *POSEY* LINE OF CASES SHOULD NOT BE FOLLOWED

In the context of protected speech determinations, the phrase "mixed question of fact and law" is probably a misnomer.[2] But clearly, the *Posey* court uses it to mean that a jury or other trier of fact must resolve underlying factual disputes before the court may render its conclusions of law. In any event, the court observed that the distinction between questions of fact and questions of law is often "vexing" and "elusive" (citing *Pullman-Standard v. Swint, supra*, 456 U.S. at 288, *Baumgartner v. United States*, 322 U.S. 665, 671, 64 S.Ct. 1240, 88 L.Ed. 1525 (1944), and *Miller v. Fenton*, 474 U.S. 104, 113, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985)), but that facts that can be "'found' 'by application of . . . ordinary principles of logic and common experience . . . are ordinarily entrusted to the finder of fact'" (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n. 17, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)). In the Ninth Circuit's estimation, questions about the

---

[2] "Mixed questions of law and fact [are] questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289-290 FN 19, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). That definition would not seem to apply here; in fact it is the direct opposite of the sort of disputed fact situation that, according to *Posey*, must be left to a jury or other fact finder to resolve.

scope of a plaintiff's job duties fall neatly into that category. *Posey v. Lake Pend Oreille School Dist., supra*, 546 F.3d at 1129.

However, it is not so obvious that determinations about the scope of job duties in protected speech cases should be relegated to a jury as a finder of fact. If the distinction between determinations of fact and law is indeed "elusive," it then cuts both ways: One could just as easily jump to the opposite conclusion that the determination is for the court rather than the jury. Thus it does not help to stigmatize the distinction as "elusive;" rather, one must look more deeply into the considerations that courts employ to determine whether the issues they confront should be characterized as factual or legal.

Preliminarily, there is the question of precedent. For instance, a great deal could be said for the proposition that the voluntariness of a confession in a criminal case is a factual issue. Nevertheless, in *Miller v. Fenton*, *supra*, 474 U.S. at 115 this Court held that it should not abandon its longstanding position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review. (Notwithstanding, as that decision acknowledged, the distinction between questions of law and fact can be "elusive," *Id.*, at 113.)

Similarly, under *Connick v. Myers*, *supra*, 461 U.S. 138, the entire protected speech question was one of law; *Garcetti* gave no indication that it intended to change the nature of the inquiry. The

conclusion of law approach to protected speech questions has proved workable; hence, there is no reason to abandon it at this juncture.

Moreover, in *Miller*, the Court also noted that "much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis." *Miller v. Fenton*, *supra*, 474 U.S. at 113-114. Further:

> "At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. Where, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law. See

> *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S., at 503, 104 S.Ct., at 1961. (*Id.* at 114.)

Similarly here, there is a sound reason for entrusting the question of the scope of a plaintiff's employment duties to the court as part of the overall protected speech analysis. *Posey*, and even more so the present case, illustrate why courts should assume the responsibility for resolving this issue. In both cases, there was no dispute about the "hard" facts: I.e. the circumstances under which the plaintiff spoke, to whom he spoke, the content of the speech, his title, and what his job consisted of in practice.

Thus, in our case, it is undisputed that Densmore spoke in a direct and immediate response to misconduct that he observed on the job; that he refused to write the false report that the perpetrator demanded, but instead reported the misconduct to the Police Chief's Administrative Sergeant through Department e-mail; that within short order he was debriefed by the Chief, a Captain, and later an outside investigator that his employer had retained to look into the allegations of misconduct; that he never communicated the misconduct to the public; and that the Police Department's policy manual, which he read, required officers to assume responsibility for responding to "violations of any law observed by them or coming to their attention."

So what were the "facts" in dispute? In *Posey*, they were largely the parties' subjective and self-serving characterizations about what they

understood the plaintiff's job to entail. Such opinions are ephemeral and, judging from the "180-degree" turns that both parties made as soon as they understood the nature of the protected speech inquiry, mutable.

And the situation is far worse in the present case. Despite the obvious conclusion to be drawn from the "hard" facts recited above, the Ninth Circuit panel applied *Posey's* "mixed question of fact and law" rule to overturn summary judgment on the strength (or is that the wrong word?) of *Densmore's* belief that (1) he had no duty to report misconduct by a senior officer and (2) the alleged "code of silence" imposed by fellow officers imposed a duty on him *not* to report misconduct. But Densmores beliefs look surprisingly like conclusions of law – albeit questionable ones.

True, a plaintiff's subjective understandings or state of mind figures as a quintessential triable issue of fact in fraud, discrimination and other types of cases where the elements of proof encompass a party's state of mind. As stated *in Pullman-Standard v. Swint, supra*, 456 U.S. at 288 (a discrimination case), treating issues of intent as factual matters for the trier of fact is "commonplace." But since neither intent nor any other state of mind is an element of proof in the *Garcetti* job-duty determination, Posey's and Densmore's personal opinions about the scope of their job duties were just that: Opinions. If given credence by a jury in its role as fact finder, those opinions would have the deleterious effect of usurping the judge's prerogative of determining questions of law. The Ninth Circuit's

memorandum decision in *Densmore* shows the depth to which this process can sink. Unless this Court reverses the Ninth Circuit panel decision, the case apparently must be tried in such a way that a jury will have the opportunity to tell the district court judge whether an alleged "code of silence" establishes a California law enforcement officer's official job duties. Surely that would be an absurdity.

CONCLUSION

It may be true that in assessing a plaintiff's job duties in a given case, a court may need to seek a jury's factual determination of *some* foundational facts. (What a plaintiff actually did on the job, what he was actually told about his job duties; what he was ordered to do or did on other occasions, etc.) But in *Posey* and the present case the appellate court effectively solicited the plaintiff's subjective opinions about the scope of their job duties. That sort of inquiry promises to produce unsound results. That determination was the court's responsibility, not a jury's. Therefore, this court should clarify that in these situations, trial and appellate courts should not treat the parties' subjective opinions about job duties as questions of fact. Instead, the courts should render their own legal conclusions based on the concrete facts. That is the "practical" inquiry that *Garcetti* invites. (547 U.S. 424.)

Dated: February 20, 2009.

Respectfully submitted,

POLLAK, VIDA & FISHER

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City of Maywood, Bruce Leflar,
Angel Villegas, Sean Richardson,
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and Darin Moeller

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

JOSEPH DENSMORE, JR.,

Plaintiff-Appellant,

v.

CITY OF MAYWOOD; BRUCE LEFLAR; ANGEL VILLEGAS; SEAN RICHARDSON; JERRY SALGADO; ROBERT LEACH; DARIN MOELLER,

Defendants-Appellees.

No. 07-56707
D.C. No. CV-06-03535-PSG

MEMORANDUM[1]

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Submitted Nov. 20, 2008[2]
Pasadena, California

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[1] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

Filed Nov. 24, 2008.

Before CUDAHY,[3] PREGERSON and HAWKINS, Circuit Judges.

Joseph Densmore, Jr. ("Densmore") appeals the district court's summary judgment grant in favor of the City of Maywood ("City") and several individual police officers employed by the City (collectively, "Defendants"). We reverse and remand for further proceedings in light of our recent decision in *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, --- F.3d ----, 2008 WL 4570616 (9th Cir. Oct. 15, 2008).

While employed by the City as a probationary police officer, Densmore reported the misconduct of his field training officer, who had used excessive force against a handcuffed suspect. Densmore alleges he was retaliated against and ultimately fired for exercising his First Amendment rights by reporting the incident.

Under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to be entitled to First Amendment protection, a public employee must demonstrate that he spoke as a private citizen rather than as a public employee pursuant to his official employment duties. *Id.* at 422-24. The Court cautioned, however, that formal job descriptions were not determinative, but that the scope of an

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[3] The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

employee's professional duties must be considered as a "practical" matter. *Id.* at 424-25.

In this case, Densmore contends that although the police manual contained a very general section directing officers to take "prompt and proper police action relative to violations of any law observed by them" regardless of their area of assignment,[1] he was a probationary officer with no official job requirement to investigate or report wrongdoing within the department, i.e, he was not employed as an "internal affairs investigator." He claims he reported his fellow officer's misconduct just as any citizen could do if he or she witnessed a police officer commit a crime.

Finally, Densmore alleges there is a "code of silence" operating within the department, so that in reality he was *not* expected to report his fellow officers, but to cover up their misdeeds. Densmore supported this assertion with his own declaration regarding comments made to him before and after the incident, as well as declarations from independent investigator Larry Weldon and police

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[1] As Densmore notes, this general provision appears to require, for example, that a traffic officer must still take police action if he witnesses a robbery. Several months after Densmore was fired, the department added a more specific general order which states "When an employee becomes aware of possible misconduct by another member of this Department, the employee shall immediately notify a supervisor."

practices expert Patrick Connolly.

The district court determined that " *Garcetti* requires the Court to first determine *as a matter of law* whether Densmore was speaking 'as a citizen' or, instead, pursuant to his job duties," and ultimately concluded that Densmore's speech was made pursuant to his employment. However, as we recently explained in *Posey,* "the determination whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law," which "can and should be found by a trier of fact." 2008 WL 4570616 at *6. As in *Posey,* "the pleadings and evidence in this case present genuine disputes of material fact regarding the scope and content of [Densmore's] job responsibilities ." *Id.* at *7; *see also Paola v. Spada,* 498 F.Supp.2d 502, 509 (D.Conn.2007) (question of fact whether state trooper's report of misconduct was born out of professional duty); *Batt v. City of Oakland,* 2006 WL 1980401,*4 (N.D.Cal.2006) (factual issue whether, notwithstanding official police department policy, culture and direction of superiors created duty *not* to report misconduct).[2]

REVERSED AND REMANDED for further proceedings consistent with this disposition.

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[2] Densmore's claim that the district court abused its discretion by denying his motion to reconsider the summary judgment motion is thereby moot.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

ENTERED	Priority ___
CLERK, U.S. DISTRICT COURT	Send X
AUG 24, 2007	Enter X
CENTRAL DISTRICT OF CALIFORNIA	Closed ___
/s/(initials) DEPUTY	JS-5/JS-6 X
	JS-2/JS-3 ___
	Scan Only ___

Case No.: CV06-3535 PSG (RZx)
Date: August 21, 2007
Title: Densmore v. City of Maywood, et al.

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy K. Hernandez	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s): Not present
Attorneys Present for Defendant(s): Not present

Proceedings: Defendant Peace Officers' Motion for Summary Judgment and Defendant City of Maywood's Motion for Summary Judgment.

Before this Court are Defendant Peace Officers' Motion for Summary Judgment and Defendant City of Maywood's

Motion for Summary Judgment. The Court heard oral argument on these motions on August 13, 2007. Now, the Court finds these motions appropriate for decision without further oral argument. Fed. R. Civ. P. 78; Local R. 7-15.

I. BACKGROUND

Joseph Densmore, Jr. ("Densmore") has brought a lawsuit against the City of Maywood ("Maywood") and several individual police officer employees of Maywood including: Bruce Leflar ("Leflar"), Angel Villegas ("Villegas"), Sean Richardson ("Richardson"), Jerry Salgado ("Salgado"), Robert Leach ("Leach"), and Darin Moeller ("Moeller").[1] Densmore's complaint alleges that Maywood and the Officer Defendants violated his constitutional rights by retaliating against him for exercising his First Amendment rights. Densmore, while employed by Maywood as a probationary police officer, reported the misconduct of another police officer. Densmore's lawsuit initially alleged three causes of action.[2] Presently, Densmore alleges two surviving causes of action, with the first cause of action including two distinct claims. The claims include: (1) a claim under 42 U.S.C. § 1983 against the Officer Defendants for violation of Densmore's First Amendment rights by the

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[1] Defendants Paul Pine and Florencio Mesa were dismissed as defendants by stipulation of the parties and court order on June 19, 2007.

[2] Densmore's second cause of action under 42 U.S.C. § 1983 against Leflar and Maywood for violation of the Fourteenth Amendment guarantee to equal protection under government laws was dismissed by stipulation of the parties and court order on June 19, 2007.

Officer Defendants' retaliation against Densmore, (2) a claim under 42 U.S.C. § 1983 against the Officer Defendants for conspiracy to violate Densmore's First Amendment rights, and (3) a claim under 42 U.S.C. § 1983 against Maywood for its municipal liability.

The Officer Defendants and Maywood have brought separate motion for summary judgment on Densmore's claims. The Officer Defendants ask the Court to rule that (1) Densmore's claim against the Officer Defendants for retaliation in violation of the First Amendment pursuant to 42 U.S.C. § 1983 fails and (2) Densmore's claim against the Officer Defendants for conspiracy in violation of the First Amendment pursuant to 42 U.S.C. § 1983 fails. Separately, Maywood asks the Court to rule that Densmore's third claim against Maywood for municipal liability pursuant to 42 U.S.C. § 1983 fails. In addition, Defendants jointly request that the Court reopen discovery and continue trial dates.

The Court rules that all Densmore's claims fail as a matter of law. Therefore, Defendants' request to reopen discovery and continue trial dates is moot.

II. STATEMENT OF FACT

A. Densmore's Employment With Maywood

Densmore applied for a position with the Maywood Police Department on December 16, 2003. (Plaintiff's Separate Statement of Genuine Issues ("PSSGI"), ¶ 1.) Maywood hired Densmore as a Probationary Peace Officer (Id., ¶ 17), and Densmore began work with Maywood's Police Department on April 1, 2004. (Densmore Decl., ¶ 2.)

Raul Mayorga ("Mayorga") was assigned as Densmore's first field training officer (FTO). (Id., ¶ 13.) Densmore worked with Mayorga from April 1, 2004 until April 21, 2004. (Id.) The Maywood Police Department's Training Protocol required FTOs to complete Daily Observation Reports (DOR) for each day of training, except for the first four days, and a Monthly Evaluation Report (MOR) at the end of each month of training. (Id., ¶¶ and 6.) As a trainee, Densmore was supposed to review and sign each DOR and MOR. (Id., ¶ 7.) Densmore claims that Mayorga never gave Densmore any DORs to sign. (Id., ¶ 8.) Furthermore, Densmore claims that Mayorga referred to him as a D.A. plant, and Densmore inferred from this that Mayorga meant that Densmore was sent to the Maywood Police Department to inform officials within the District Attorney's office about officers' misconduct. (Id., ¶ 10.)

Officer Michael Singleton ("Singleton") acted as Densmore's second FTO. (Densmore Decl., ¶ 11.) Singleton worked with Densmore from April 28, 2004 until May 15, 2004. (Id., ¶ 18.) Densmore alleges that Singleton directed Densmore to fill out the DORs for almost every day that they worked together, and Densmore followed Singleton's directions and rated himself with high ratings. (Id., ¶ 19.) Furthermore, Densmore alleges that Singleton read and signed the DORs that Densmore prepared. (Id.)

B. Densmore's Reporting of Misconduct by a Fellow Maywood Police Officer

On May 13, 2004, Densmore claims that he observed Singleton beat up a handcuffed prisoner in the sally port area of the police station and that a portion of the beating was captured on videotape by the Maywood Police Department's video system. (Densmore Decl., ¶ 20.) Singleton rendered

prisoner Bernal unconscious by strangling him and beating him with his left fist. (Id., ¶ 21.) Densmore also radioed for Fire Paramedics and for Sergeant Sean Richardson to come to the Police Station. (Id., ¶ 22.) The Los Angeles County Fire Paramedics attended to Bernal and determined that he might have suffered a stroke. (Id., ¶ 23.) Densmore followed the ambulance transporting Bernal to the emergency room at St. Francis Hospital. (Id., ¶ 24.)

Singleton and Densmore then rode back to the Police Station together. (Densmore Decl., ¶ 24.) Densmore claims that Singleton told Densmore that they would have to write a report to justify Singleton's use of force. (Id.) Singleton tried to persuade Densmore to write a false report about Singleton's use of force which would have stated that Bernal committed a felony assault with force likely to result in great bodily injury in violation of § 245 of the California Penal Code by (1) head butting Singleton, (2) kicking Singleton, and (3) attempting to bite Singleton. (Id., ¶ 25.) Densmore claims that he refused to follow Singleton's instructions to prepare a false report, and Singleton instead rewrote Densmore's report by using Densmore's password. (Id.)

On May 14, 2004, Densmore sent an e-mail to Sergeant Robert Leach alerting him to the misconduct by Officer Singleton. (Densmore Decl., ¶ 27.) Leach was the administrative sergeant and worked directly for Chief of Police Leflar. (Id.) Eventually, Singleton left the Maywood Police Department and was charged by the L.A. County D.A.'s office with using excessive force against Bernal on May 13,2004. (Id., ¶ 34; PSSGI, ¶¶ 68-69.)

C. Maywood's Alleged Retaliation for Densmore's Reporting of Police Misconduct

Densmore claims that beginning on May 15, 2004, the day after Densmore reported Singleton's misconduct, Maywood police officers began retaliating against him for his reporting of Singleton's misconduct. (Densmore Decl., ¶ 28.) This included falsely accusing Densmore of failing to follow orders and correct procedures at crime scenes. (Id., ¶¶ 28-31.) Furthermore, Densmore claims that the twelve DORs in his training file for the time he worked with Singleton were removed from his "training book" prior to Densmore's receipt of a copy of the "training book" through discovery. (Id., ¶ 32.) Also, a week after Densmore reported Singleton's misconduct, Densmore was reassigned Officer Villegas as his third FTO. (Id., ¶¶ 35-36.)

Densmore worked with Villegas from May 19, 2004 until June 16, 2004. (Densmore Decl., ¶ 35.) Densmore claims that as they left the Police Station on May 19, 2004, Villegas told him, "Densmore, I don't think you're going to make it." (Id., ¶ 36.) Densmore had never worked with Villegas before. (Id.) Densmore also claims that Villegas exaggerated or fabricated eighteen instances of Densmore allegedly performing his duties in an unsafe manner. (Id., ¶ 38.)

Maywood claims that Densmore failed to satisfactorily perform his duties as a Probationary Peace Officer. Among many allegations of Densmore's inadequate job performance, Maywood claims that Densmore repeatedly put the safety of himself and other peace officers at risk. (PSSGI, ¶ 18.) Also, Maywood alleges that Densmore could not handle stressful situations, and Densmore was cited for "freezing up" on more than one occasion. (Id., ¶ 44.) Maywood alleges that based

on Densmore's poor performance during his probationary period, the Maywood Police Department terminated him. (Id., ¶ 58.)

D. Densmore's Duty to Report Singleton's Misconduct

Densmore claims that on May 20, 2004, he met with Chief of Police Leflar and with Captain Moeller regarding the May 13, 2004 incident involving Officer Singleton. (Densmore Decl., ¶ 97.) Leflar and Moeller indicated to Densmore that they wished to discuss the e-mail Densmore sent to Sergeant Leach on May 14, 2007. (Id.) Densmore claims that he truthfully answered their questions, he did not provide any recommendations, and neither Leflar nor Moeller asked for any recommendations. (Id., ¶ 98.)

Furthermore, Densmore states that as a probationary officer, he had no official job requirement to ferret out, investigate, and prosecute criminal or other wrongdoing within the rank and file of the Maywood Police Department. (Densmore Decl., ¶ 121.) Densmore's official duties did not include supervision of patrol officers. (Id., ¶ 122.) Densmore claims that when he sent the e-mail reporting Singleton's misconduct to Sergeant Leach, Densmore was acting as any citizen should if he witnesses a police officer commit a crime. (Id., ¶ 123.) Also, Leach never spoke to Densmore about the e-mail, and Densmore was never asked to prepare a report detailing what he had seen regarding the Singleton/Bernal incident. (Id., ¶ 124.) After meeting with Chief Leflar and Captain Moeller on May 20, 2004, Densmore's next involvement with the Singleton/Bernal incident was to give a statement to David Weldon, an outside investigator hired by Maywood to conduct an internal investigation. (Id., ¶ 126.) Densmore claims that all his

statements regarding the Singleton/Bernal incident were made as a concerned citizen who wanted to do the right thing. (Id., ¶ 128.)

However, Maywood disputes Densmore's characterization of his reporting of Singleton's misconduct. Maywood claims that (1) all Maywood police officers must take prompt and proper police action with respect to any violations of law that come to their attention (PSSGI, ¶ 59); (2) all Maywood peace officers must immediately notify a supervisor when they become aware of possible misconduct by another peace officer (Id., ¶ 60); (3) all peace officers who observe serious misconduct must take appropriate action to cause the misconduct to immediately cease, (Id., ¶¶ 61 and 62.); and (4) all Maywood police officers are responsible for preventing and reporting misconduct. (Id.) Also, Maywood Police Department's Manual of Policy and Procedure explicitly states in the section titled "4.12 Responsibility of All Officers" that "[t]he special delegation of the enforcement of certain laws to particular divisions or other units does not relieve officers of the responsibility of taking prompt and proper police action relative to violations of any law observed by them or coming to their attention." (Decl. of Jennifer Swiller, Exh. I, ch. 4, p. 3/12.) Densmore admits in his declaration that he read the Maywood Police Manual. (Densmore Decl., ¶ 113.)

III. DISCUSSION

A. Legal Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) establishes that summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. *See id.* at 257.

A non-moving party who bears the burden of proving at trial an element essential to its case must sufficiently establish a genuine dispute of fact with respect to that element or face summary judgment. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. See *Anderson*, 477 U.S. at 250-51.

B. First Claim Pursuant to 42 U.S.C. § 1983 for Retaliation in Violation of the First Amendment

1. First Amendment Protection for Speech of a Public Employee

"It is well settled that 'a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.'" *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1955, 164 L. Ed. 2d 689 (2006) (citing *Connick v. Myers*, 461 U.S. 138,142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)). "Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti*, 126 S. Ct. at 1957. "In such

circumstances, an employer may not retaliate against an employee for engaging in protected speech." *Sigsworth v. City of Aurora, Illinois*, 487 F.3d 506, 509 (7th Cir. 2007).

The U.S. Supreme Court has noted that its decision in *Pickering v. Board of Ed. Township High School Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) "and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. . . . If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. . . . If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. . . . This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Garcetti*, 126 S. Ct. at 1958 (internal citations omitted).

"The Court's decisions ... have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions." *Id.* at 1959.

2. Factors Determining Whether a Public Employee's Speech is Protected by the First Amendment

The Supreme Court, in *Garcetti*, has provided further guidance to determine when a public employee speaks as a citizen for First Amendment purposes. In that case, the Court considered a First Amendment retaliation claim where the relevant speech included a disposition memorandum written by Richard Ceballos, a deputy district attorney, to his supervisors that raised concerns about possible misrepresentations contained in a search warrant affidavit and recommended dismissal of the case. *Garcetti*, 126 S. Ct. at 1955-56. Ceballos's supervisors proceeded with prosecution despite his recommendations, and Ceballos later claimed that, in the aftermath of his speech to his supervisors, he was subjected to a series of retaliatory employment actions including reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. *Id.* at 1956. The Court found that Ceballos's relevant speech was made in his role as an employee, not as a citizen, and considered several factors in its determination that Ceballos's speech lacked First Amendment protection.

The Supreme Court noted that where Ceballos made his speech and the fact that his speech concerned his employment were not controlling factors in determining whether his speech was entitled to constitutional protection. "That [a public employee] express[es] his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work. . . . Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like 'any

member of the general public' . . . to hold that all speech within the office is automatically exposed to restriction." *Garcetti*, 126 S. Ct. at 1959. Furthermore, that an employee's speech concerns the subject matter of his employment is also nondispositive. *Id.* "The First Amendment protects some expressions related to the speaker's job." *Id.*

The Supreme Court noted that the controlling factor in determining whether Ceballos's speech was entitled to protection was that he was merely performing his job duties in making the relevant speech. The Supreme Court reasoned that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 126 S. Ct. at 1960. A public employee does not act as a citizen when he goes about conducting his daily professional activities. *See id.* When a public employee goes to work and performs the tasks he is paid to perform, he acts as a government employee. *Id.* In reaching this conclusion, the Supreme Court rejected the suggestion that "employers can restrict employees' rights by creating excessively broad job descriptions . . . . Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Id.* at 1962.

The dissenting opinions in *Garcetti* provided further emphasis on the point that a public employee who speaks in his job duties does not have First Amendment protection for that speech. Justice Stevens argued that the answer to the question "whether the First Amendment protects a

government employee from discipline based on speech made pursuant to the employee's official duties" should be "sometimes" instead of the majority's "never." *Garcetti*, 126 S. Ct. at 1962 (Stevens, J., dissenting). Justice Breyer also characterized the majority's opinion as holding that a public employee speaking in the course of his duties "never" has protection for his speech. See *Garcetti*, 126 S. Ct. at 1974 (Breyer, J., dissenting).

3. Was Densmore's Speech Made as a Citizen About a Matter of Public Concern?

Keeping *Garcetti* in mind, the Court now considers Densmore's claim of First Amendment retaliation. Densmore argues both that his speech was made in his role as a citizen and that his speech touched on matters of utmost public concern, and thus, Densmore claims that his speech is entitled to First Amendment protection. However, *Garcetti* requires the Court to first determine as a matter of law whether Densmore was speaking "as a citizen" or, instead, pursuant to his job duties before addressing the other issues necessary to determine whether Densmore's speech was entitled to First Amendment protection.[3]

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[3] In *Connick v. Myers*, 461 U.S. 138, 148 f.n. 7, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), the Supreme Court established that "[t]he inquiry into the protected status of speech is one of law, not fact." In the wake of *Garcetti*, the Ninth Circuit has applied this principle to the question of whether a public employee speaks as a citizen or within the scope of his duties. See *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006) (finding that a plaintiff acted as a citizen when she wrote letters to government officials).

Densmore provides several arguments to support his claim that he was merely acting as a concerned citizen when he reported his fellow officer's misconduct. Densmore claims that because he was employed merely as a probationary police officer, his job did not include duties as an "internal affairs investigator." (Densmore Decl., § 121.) Densmore also states that his job duties did not include supervision of patrol officers. (Id., ¶ 122.) In essence, Densmore claims that when he prepared and sent an e-mail to Sergeant Leach reporting Officer Singleton's misconduct, Densmore was trying to do what any citizen would do if he had witnessed a police officer commit a crime. (Id., ¶ 123.) Furthermore, Densmore claims that this case is distinguishable from *Garcetti* because his reporting of his fellow officer's misconduct could have been done by a citizen, and therefore, the reasoning from *Garcetti* does not apply because, unlike in *Garcetti*, there is a "relevant analogue to speech by citizens who are not government employees." *Garcetti*, 126 S. Ct. at 1961. Finally, Densmore argues that there was a "code of silence" operating in the Maywood Police Department, and despite any evidence to the contrary, Densmore was in reality expected to help cover up the misdeeds of his fellow officers. Therefore, Densmore argues that he was acting in violation of his actual duty as a Maywood police officer when he reported his fellow officer's misconduct.

Densmore's claim that he was merely acting as a concerned citizen is unconvincing for four primary reasons. First, it is not clear that any citizen could have made the relevant speech that Densmore made. Also, even if a citizen could have made the relevant speech that Densmore made, this fact is not persuasive because the *Garcetti* Court made clear that the determinative factor in deciding whether the speech of a public employee should receive First Amendment protection is whether the public employee speaks in the

course of performing his job duties.

Second, Maywood places an explicit duty on its police officers to take proper police action when confronted with illegal conduct, just as Densmore did. Maywood Police Department's Manual of Policy and Procedure explicitly states in the section titled "4.12 Responsibility of All Officers" that "[t]he special delegation of the enforcement of certain laws to particular divisions or other units does not relieve officers of the responsibility of taking prompt and proper police action relative to violations of any law observed by them or coming to their attention." (Decl. of Jennifer Swiller, Exh. I, ch.4, p. 3/12.) Densmore admits in his declaration that he read the Maywood Police Manual. (Densmore Decl., ¶ 113.) Therefore, Densmore should have been aware of his duty to report the criminal activity of his fellow officers. Densmore cannot escape the fact that Maywood clearly and unambiguously placed a duty on him as one of its police officers to "take prompt and proper police action" in light of his discovery of his fellow officer's clearly criminal conduct. In this case, "prompt and proper police action" included reporting his fellow officer's misconduct to Densmore's superior officers.

Third, even without Maywood's explicit statement of an officer's duty to take proper police action upon discovering a clear violation of a law by a fellow officer, this duty was undoubtedly and obviously incumbent on Densmore as a police officer as a matter of public policy. Also, the California courts have stated for many years regarding law enforcement officers that

> "[s]uch officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of

> maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws. When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts ... when called upon to do so . . . It is for the performance of these duties that police officers are commissioned and paid by the community, and it is a violation of said duties for any police officer to refuse to disclose pertinent facts within his knowledge . . ."

Titus v. Civil Service Com., 130 Cal.App.3d 357, 364, 181 Cal.Rptr. 699 (1982); *Christal v. Police Commission*, 33 Cal.App.2d 564, 567-68, 92 P.2d 416 (1939). *See also Alhambra Police Officers Ass'n v. City of Alhambra Police Dept.*, 113 Cal.App.4th 1413, 1422-23, 7 Cal.Rptr.3d 432 (2003). The California courts' repeated and long-established statements about police officers' duties comport with common sense. Thus, even without Maywood's explicit statement of Densmore's duties, Densmore should have been aware that he had a duty as a police officer to report his fellow officer's clearly criminal misconduct.

Densmore claims that he had no such duty as a police officer because there existed a "code of silence" in the Maywood Police Department. Therefore, Densmore argues that his actual duty as a Maywood police officer was to keep silent about his fellow officer's misconduct and to help to cover it up. The Court is aware that a Northern District of California decision in *Batt v. City of Oakland*, 2006 WL 1980401 (N.D. Cal. 2006) accepted precisely the same "code of silence" argument in a factually similar case on a motion for summary judgment. In *Batt*, Keith Batt alleged that while he was a trainee working for the Oakland Police Department, he observed his fellow officers commit numerous brutal and illegal acts. *Id.* at *1. The *Batt* court noted that Batt provided several pieces of evidence in support of his contention that "he feared retaliation in the event of speaking out, and that the [Oakland Police Department] had a general culture of punishing officers who reported misconduct." *Id.* at *2. In analyzing whether Batt acted as a citizen or was merely performing his job duties when he reported his fellow officers' misconduct, the Batt court stated that, based on *Garcetti*, "an employer's articulation of a 'duty,' without more, does not eliminate any obligation to comply with the First Amendment. Rather a court must determine whether the employee is 'actually expected to perform' the potentially protected act." *Id.* at 4. Based on this reasoning, the *Batt* court found that Batt had presented evidence that the "code of silence" within the Oakland Police Department created an issue of fact regarding Batt's duties as a police officer.

In this case, the Court finds that the reasoning from *Batt* is unconvincing and rejects Densmore's argument about the "code of silence." Here, Densmore has submitted evidence that supports his claim that a "code of silence" existed within the Maywood police department. However, even assuming the existence of the "code of silence," the pressure exerted by his fellow officers cannot supercede Densmore's fundamental duties as a police officer. While Densmore's reporting of his fellow officer's misconduct might have required courage to resist intense pressure from his fellow officers, Densmore was fulfilling his duties as a police officer by doing so. What Densmore was "actually expected to do" was to uphold the law, despite his fellow officers' illegal and contrary expectations. What Densmore was "actually expected to do" was to fulfill his fundamental duty as a police officer and report his fellow officer's criminal misconduct, a duty that, while difficult in some circumstances to uphold, California courts have long recognized.

Finally, the fourth primary reason the Court rejects Densmore's contention that he was acting as a citizen when making his speech is that Densmore reported Singleton's misconduct only to Sergeant Leach, the administrative sergeant who worked directly for Police Chief Leflar. Densmore never reported Singleton's misconduct to the press or to anyone outside of the police department. Densmore's actions suggest that he intended to proceed with his report against Singleton according to police department policies, rather than as a citizen intending to publicize Officer Singleton's misconduct.

Thus, following *Garcetti*, the Court must reluctantly conclude that Densmore's reporting of Officer Singleton's misconduct was done pursuant to his duties as a Maywood police officer and is not entitled to First Amendment protection.[4] This conclusion is also supported by the dissenting opinion of Justices Souter, Stevens, and Ginsburg in *Garcetti*.

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[4] Though this result seems harsh and unjust given the very serious misconduct of Maywood's Police Department, the Court notes that while Densmore does not have a First Amendment cause of action, that is not to say that he could not recover under another legal theory. In fact, the Supreme Court in *Garcetti* also found that the availability of other legal remedies under state whistle-blower statutes counseled against creating a First Amendment remedy for public employees speaking in the course of their duties. See *Garcetti*, 126 S. Ct. at 1962. For example, Cal. Labor Code § 1102.5(b) states that "[a]n employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." Cal. Labor Code § 11 02.5(b). This statute provides protection to public employees such as law enforcement officers because under Cal. Labor Code § 1102.5(c), "[a] report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b)." Cal. Labor Code § 1102.5(e). See also *Sigworth v. City of Aurora, Illinois*, 487 F.3d 506, 511 (7th Cir. 2007) (analyzing a First Amendment retaliation claim and other remedies available under Illinois' almost identical statute, 740 Ill. Comp. Stat. §§ 174/15 & 30 (2007)).

In discussing the scope of the majority's opinion, these three justices considered the example of "a law enforcement officer [who] expressly balks at a superior's order to violate constitutional rights he is sworn to protect" and noted that "[t]he majority . . . places [this] speaker[] beyond the reach of First Amendment protection against retaliation." *Garcetti*, 126 S. Ct. at 1967 (Souter, J., dissenting).

Therefore, because the Court finds that Densmore cannot show that his relevant speech was entitled to First Amendment protection, Densmore's first claim pursuant to 42 U.S.C. § 1983 against the Officer Defendants for violation of Densmore's First Amendment rights fails as a matter of law.

C. Second Claim Pursuant to 42 U.S.C. § 1983 for Conspiracy to Violate Densmore's First Amendment Rights

Because Densmore's second claim requires proof of a violation of Densmore's First Amendment rights and the Court has already determined that no such violation can be shown, Densmore's second claim pursuant to 42 U.S.C. § 1983 for conspiracy to violate Densmore's First Amendment rights fails as a matter of law.

D. Third Claim Pursuant to 42 U.S.C. § 1983 for Municipal Liability for Violation of Densmore's First Amendment Rights

Similar to Densmore's second claim, Densmore's third claim pursuant to 42 U.S.C. § 1983 for municipal liability is based on Densmore's allegation that Maywood was responsible for its employees' violations of Densmore's First Amendment rights. However, because the Court has already determined that Densmore will not be able to prove a violation of his First Amendment rights, the Court finds that Densmore's third claim fails as a matter of law.

E. Defendants' Motion to Reopen Discovery and Continue Trial Dates

Because the Court has found that all Densmore's claims fail as a matter of law, Defendants' request to reopen discovery and continue trial dates is moot. The Court will not consider this motion.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' Motions for Summary Judgment. The Court finds that all Densmore's claims fail as a matter of law. Also, the Court finds that Defendants' motion to reopen discovery and continue trial dates is moot.

IT IS SO ORDERED.

Initials of Preparer /s/

(2)

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No. 08-1082

IN THE
Supreme Court of the United States

CITY OF MAYWOOD, BRUCE LEFLAR, ANGEL VILLEGAS, SEAN RICHARDSON, JERRY SALGADO, ROBERT LEACH AND DARIN MOELLER,

Petitioners,

v.

JOSEPH DENSMORE, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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June 2009

QUESTIONS PRESENTED

1. Under the First Amendment analysis in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), should a district court decide material disputes over the scope and content of a public employee's job duties as a matter of law on summary judgment?

2. Did the court of appeals correctly conclude that there were genuine issues of material fact regarding the scope and content of Joseph Densmore's job duties?

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INTRODUCTION

In *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), this Court held that speech made by public employees "pursuant to their official duties," rather than as citizens, does not receive First Amendment protection. The Court made clear that the inquiry into the scope of an employee's job duties is a "practical one" that requires looking at "the duties an employee actually is expected to perform." *Id.* at 424. In this case, the court of appeals found that there were disputed issues of material fact about the scope and content of Respondent Joseph Densmore's job duties that precluded summary judgment. Pet. App. A-4. Petitioners seek review of this fact-bound determination, claiming a circuit split over whether the scope of a public employee's job duties is a question of law or a question of fact. But although some of the cases cited by Petitioners hold that the ultimate question of whether an employee was speaking as an employee or citizen is a question of law, none of them resolve underlying disputes about the employee's actual job duties at summary judgment. Here, where there were underlying disputes over what duties the public employee was expected to perform, the court below correctly held that there were disputed issues of material fact and, accordingly, correctly denied summary judgment.

STATEMENT OF THE CASE

On April 1, 2004, Joseph Densmore began working for the City of Maywood as a probationary police officer trainee. Pet. App. B-3. Six weeks later, on May 13, Densmore saw Michael Singleton, his field training officer, beat up a handcuffed prisoner, Jose Bernal, in the sally port area of the police station, an area visible to the public. Singleton strangled and beat Bernal, leaving him unconscious. Densmore radioed the Fire Paramedics and

Sergeant Sean Richardson and followed the ambulance carrying Bernal to the hospital. *Id.* at B-4-B-5.

On the way back to the police station from the hospital, Singleton told Densmore that they were going to have to write a report justifying Singleton's use of force. Singleton attempted to persuade Densmore to falsify the report and claim that Bernal had committed a felony assault likely to result in great bodily injury in violation of § 245 of the California Penal Code by head-butting, kicking, and attempting to bite Singleton. Densmore refused to follow his field training officer's instructions. Singleton eventually gave up coaching Densmore and rewrote the report using Densmore's password. *Id.* at B-5.

Although Densmore knew that there was an unofficial code of silence within the Maywood Police Department, under which officers were expected to cover up for each other, *see* Appellant's Excerpts of Record in the Ninth Circuit (Ct. App. ER) at 245, and although the field training program policy prohibited him from communicating outside his chain of command, *id.* at 280, the next day, while off duty, Densmore e-mailed Sergeant Robert Leach about Singleton's misconduct. *Id.* at 136, 311. Six days later, he met with Chief of Police Bruce Leflar and Captain Darin Moeller to talk about the incident. Pet. App. B-7.

Starting the day after he sent his e-mail to Leach, police officers began treating Densmore differently. A supervisory officer who had previously been friendly became confrontational, chastised Densmore in front of civilian witnesses, and falsely accused him of failing to follow orders and correct procedures. Ct. App. ER 232-34.

Another officer said to him: "I smell cheese, there must be a rat." Sergeant Leach stated, "We should have left him in Orange County." *Id.* at 245. On May 19, Densmore was assigned to work with Officer Angel Villegas, who proceeded to exaggerate or fabricate eighteen instances of Densmore allegedly performing his duties in an unsafe manner. *Id.* at 235. Less than a month later, Densmore was fired.

Densmore brought this action against the City of Maywood and several police officer employees for retaliating against him for exercising his First Amendment rights. The district court granted summary judgment for the defendants. Quoting *Garcetti v. Ceballos*, 547 U.S. at 421, the court explained that "'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.'" Pet. App. B-12. However, although Densmore had presented evidence that reporting his supervisor's misconduct was not within the scope of the job duties he was actually expected to perform, the district court nonetheless concluded as a matter of law that he was acting within the scope of those duties.

The court of appeals reversed in a short unpublished decision. The court recognized that in determining whether a public employee is acting as a citizen or as an employee pursuant to his job duties, "formal job descriptions [are] not determinative, but that the scope of an employee's professional duties must be considered as a 'practical' matter," Pet. App. A-2-A-3 (quoting *Garcetti*, 541 U.S. at 424-25), and it explained that "'the determination whether the speech in question was spoken as a public employee or a private citizen presents a mixed

question of fact and law." *Id.* at A-4 (quoting *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008)). Noting that Densmore had presented evidence of a code of silence in the department to show "that in reality he was *not* expected to report his fellow officers, but to cover up their misdeeds," *id.* at A-3 (emphasis in original), the court determined that, here, there were "genuine disputes of material fact regarding the scope and content of [Densmore's] job responsibilities" that precluded summary judgment. *Id.* at A-4 (citation ommitted) (alteration in original).

REASONS FOR DENYING THE WRIT

I. There is No Meaningful Circuit Split Here.

Petitioners' primary argument for review is that there is a circuit split over whether the scope of a public employee's job duties is a question of law. Pet. 28. But although some courts describe the *ultimate question* of whether a public employee is speaking as a citizen or as an employee pursuant to his job duties as a "matter of law" and others describe it as a "mixed question of law and fact," none of the cases cited by Petitioner holds that where there is a subsidiary dispute over the scope and content of an employee's actual job duties—such as found by the court of appeals in this case—that dispute should be resolved by the court.

For example, Petitioners contend that the decision below is in conflict with the Fifth Circuit, relying on *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008). In *Charles*, however, the court stated that the *ultimate question* of whether "speech is entitled to protection" is a matter of law. *Id.* at 513 n.17. The court did not mention any

material dispute over the scope of Charles's job duties—it found that Charles was not speaking as an employee under any "conceivable job duties" he might have, *id.* at 514—and it did not opine about whether it would have resolved the dispute at summary judgment if such a dispute had existed. Tellingly, when the Fifth Circuit found the plaintiff's official job duties unclear in a post-*Charles* case, *Williams v. Riley*, 275 Fed. Appx. 385 (5th Cir. 2008), the court denied summary judgment.

Similarly, although the court in the Tenth Circuit case relied on by Petitioners, *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007), stated that the question of whether the employee is speaking pursuant to his official duties was a question for the court, it did not indicate that there were material disputed questions over the scope of those job duties. In fact, the court noted that it was "viewing the evidence in the light most favorable to the plaintiffs," *id.* at 1204, indicating that it recognized that there can be disputed factual issues in determining whether an employee is speaking pursuant to job duties. Finally, in the other case on which petitioners rely to demonstrate a split, *Wilburn v. Robinson*, 480 F.3d 1140, 1150 (D.C. Cir. 2007), the D.C. Circuit did not need to resolve disputes over the scope of the employee's job duties because it determined that the speech fell within the employee's job responsibilities *as they were described by her.*

In short, Petitioners have not demonstrated that the courts that describe the ultimate question as being a "matter of law" would resolve cases at summary judgement where, as here, there are underlying disputes about what duties an employee actually is expected to

perform. And the Ninth Circuit agrees that, once the factual disputes about the scope and content of the employee's job duties are resolved, the "'ultimate constitutional significance of the facts as found' is a question of law." *Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009) (quoting *Posey*, 546 F.3d at 1129). Indeed, when there are no material disputed issues about the scope of the employee's job duties, courts in the Ninth Circuit decide the ultimate issue of whether the speech was spoken as a citizen or as an employee pursuant to job duties as a matter of law. *See White v. Nevada*, 312 Fed. Appx. 896, 897 (9th Cir. 2009) (stating, in affirming summary judgment, that the plaintiffs' speech was "made pursuant to their official duties rather than their rights as private citizens"); *Brown v. Hawaii*, 2009 WL 330209, at *10 (D. Haw. Feb. 10, 2009) (concluding, on motion to dismiss, that certain statements were made pursuant to job duties). The Third Circuit, which the petition places on the Ninth Circuit's side of the purported split, does the same. *See Gorum v. Sessons*, 561 F.3d 179, 186 (3rd Cir. 2009) (stating, in affirming summary judgment, that plaintiff's actions "came within the scope of his official duties"). There is no meaningful conflict here.

II. The Court of Appeals Correctly Concluded That There Are Genuine Issues of Material Fact that Preclude Summary Judgment

1. In their first question presented, Petitioners ask this Court to grant review to determine as a matter of law whether Densmore spoke pursuant to his job duties. Pet. i. Notably, the text of the Petition offers no argument for why this case-specific question is worthy of this Court's review. *See* S. Ct. R. 10.

In any event, deciding as a matter of law that Densmore was speaking as an employee would be inconsistent with *Garcetti*'s explanation that the proper inquiry is "a practical one." *Garcetti*, 547 U.S. at 424. Petitioners' argument relies heavily on a general statement in the police department's policy manual that officers are supposed to respond to violations of law that come to their attention. *See* Pet. i, 35. But Densmore presented evidence that, despite that statement, he was not actually expected to report misconduct by fellow officers. Granting summary judgment to defendants based on the policy manual, when Densmore presented conflicting evidence about his actual job duties and demonstrated that, in reality, his supervisors' expectations diverged sharply from that policy statement, would conflict with this Court's recognition in *Garcetti* that the proper inquiry must focus on "the duties an employee is actually expected to perform," not his "[f]ormal job description." 547 U.S. at 424-25. As *Garcetti* explained, "the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties." *Id.* at 425.[1]

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[1]Petitioners also claim that "California law" requires police officers to report crimes. Pet. i. Although Petitioners cite no California statutes or caselaw, they are presumably referring to *Titus v. Civil Service Comm'n*, 130 Cal. App. 3d 357 (1982), *Christal v. Police Comm'n*, 33 Cal. App. 2d 564 (1939), and *Alhambra Police Officers Ass'n v. City of Alhambra Police Dep't*, 113 Cal. App. 4th 1413 (2003), which were cited in the district court's opinion. Pet. App. B-16. Those cases, however, discuss a

(continued...)

Garcetti also shows that the other factors relied on by Petitioners to support their claim that Densmore was acting within his job duties are not dispositive. Petitioners note that Densmore observed Singleton's misconduct while on the job, reported it to people in the department, and never communicated it to the public. Pet. 35. However, Densmore was a trainee with no responsibility to investigate other officers, he reported on his own time, and he reported outside his chain of command. Moreover, *Garcetti* specifically stated that the First Amendment may protect "expressions made at work" and "expressions related to [a public employee's] job." *Garcetti*, 547 U.S. at 420-21. Given the genuine disputed issues over the scope and content of Densmore's job duties, the court of appeals was correct to remand the case for further proceedings to determine whether the First Amendment protected Densmore's speech here.

2. Petitioners nonetheless contend that summary judgment should have been granted in their favor, asserting that the scope of an employee's job duties should be decided by the court as a matter of law. But questions about what duties a public employee is expected to perform, when in genuine dispute, involve precisely the "application of those ordinary principles of logic and common experience which are ordinarily entrusted to the

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[1](...continued)
police officer's duty to cooperate with ongoing criminal investigations, not a duty to report misconduct by a supervising officer. *See Titus*, 130 Cal. App. 3d at 365; *Christal*, 33 Cal. App. 2d at 567; *Alhambra Police Officers Ass'n*, 113 Cal. App. 4th at 1423.

finder of fact." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984).

Petitioners analogize the determination of whether an employee has acted pursuant to his job duties to the voluntariness of confessions, citing *Miller v. Fenton*, 474 U.S. 104, 115 (1985). In *Miller*, this Court held that the "ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution," was a legal question that required an independent federal determination. *Id.* at 112. The Court recognized, however, that "subsidiary factual questions," were entitled to a presumption of correctness given to findings of fact. *Id.* Similarly, here, the disputed subsidiary factual questions about the scope and content of an employee's actual job duties are not legal questions that can be resolved at summary judgment.[2]

Indeed, at the very end of the Petition, even Petitioners appear to recognize that the trier of fact can play a role when an employee's job duties are in dispute, admitting that "[i]t may be true that in assessing a plaintiff's job duties in a given case, a court may need to seek a jury's factual determination of *some* foundational facts." Pet. 37 (emphasis in original). Petitioners' unwillingness to

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[2]Petitioners also invoke *Miller v. Fenton* for the proposition that sometimes "one judicial actor is better positioned than another to decide the issue in question." Pet. 34 (quoting *Miller*, 474 U.S. at 114). Petitioners, however, offer no reason why courts are "better positioned" than juries to resolve underlying questions about what is expected of an employee.

recognize the facts at issue in this case as the type of facts that are appropriately decided by a trier of fact stems from their characterization of those facts as "the plaintiff's subjective opinions about the scope of [his] job duties." *Id.* But Densmore's evidence was not about his "belief," "subjective understandings," or "personal opinions about the scope of [his] job duties." *Id.* at 36. The evidence included not only his own testimony about what he was told by his supervisor about his job duties, *e.g.*, Ct. App. ER at 247, but a declaration from a private investigator who had "conduct[ed] numerous background investigations and . . . a substantial number of internal investigations" for the department, including the internal investigation into the Singleton matter, discussing the code of silence in the department, *id.* at 309, and a declaration from a police practices expert who found it "apparent . . . that the defacto policies of the Department informed officers that it was unacceptable to report a fellow officer for misconduct." *Id.* at 358. In short, evidence from Densmore, from an independent investigator, and from a police practices expert all helped create a genuine dispute of material fact over the scope and content of Densmore's job duties. And given these genuine issues of material fact, the court of appeals was correct to deny summary judgment. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[S]ummary judgment will not lie if the dispute about a material fact is 'genuine[.]'").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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